Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LOTTIE J. MILLER,

Petitioner,

v.

FIRSTAR BANK N.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a circuit court at liberty to deviate from this Court's precedent in *Reeves v. Sanderson Plumbing Products, Inc.*? In other words, in an action brought under Title VII of the Civil Rights Act of 1964, as amended, may a circuit court uphold an order of summary judgment in favor of an employer where the employee has established a prima facie case of race discrimination and, in addition, has produced sufficient evidence for a reasonable jury to find that the employer's asserted justification for its actions was false and that the employer intentionally discriminated?

PARTIES TO THE PROCEEDING

Petitioner – Lottie J. Miller

Respondent – Firstar Bank, N.A.

Petitioner, Lottie J. Miller, is an individual.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Lottie J. Miller, respectfully petitions this Court for a writ of certiorari to review the erroneous opinion of the United States Court of Appeals for the Sixth Circuit, Case No. 02-5857, dated September 1, 2004. The circuit court's opinion upheld the granting of summary judgment for the respondent, Firstar Bank, on Miller's claims under Title VII of the Civil Rights Act of 1964, as amended, despite the fact that Miller established a prima facie case of race discrimination and, in addition, produced sufficient evidence of pretext, pursuant to this Court's ruling in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), for a reasonable jury to find intentional discrimination. With its decision in this case, the circuit court has substantially undermined this Court's guidance in *Reeves* and has compromised the purpose and promise of Title VII.

OPINIONS BELOW

On September 1, 2004, the United States Court of Appeals for the Sixth Circuit issued its opinion [Pet. App. at 2a] affirming the district court's order dated January 29, 2002 [Pet. App. at 21a], which granted summary judgment for Firstar and dismissed Miller's Title VII claims. The circuit court's opinion is unofficially reported at 111 Fed. Appx. 796; 2004 U.S. App. LEXIS 18967; 94 Fair Empl. Prac. Cas. (BNA) 736. The circuit court's order of September 27, 2004, denying Miller's petition for rehearing [Pet. App. at 1a], is unreported.

The district court's summary judgment decision is unofficially reported at 2002 U.S. Dist. LEXIS 1525; 88 Fair Empl. Prac. Cas. (BNA) 68. The district court's decision

dated January 29, 2002, denying Miller's motion to alter, amend or vacate the judgment [Pet. App. at 16a] is unofficially reported at 2002 U.S. Dist. LEXIS 10331.

JURISDICTION

The certiorari jurisdiction of this Court is invoked in conformity with 28 U.S.C. § 1254(1). The United States Court of Appeals for the Sixth Circuit issued its opinion on September 1, 2004, and issued its decision denying Miller's petition for rehearing on September 27, 2004.

RELEVANT PROVISIONS

The relevant provisions of Title VII of the Civil Rights Act of 1964, as amended, are set forth below:

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

* * * * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2.

STATEMENT OF THE CASE

A. Proceedings Below.

Petitioner, Lottie J. Miller, brought this action against the Respondent, Firstar Bank, NA, under Title VII of the Civil Rights Act of 1964, as amended, for employment discrimination on the basis of race. At the time of her demotion from the position of Branch Manager and her replacement by a less-experienced white employee, she had far exceeded the goals set out for her by bank management and was the only African-American Branch Manager ever employed by Firstar or its predecessor banking institutions in the Western Kentucky Region.

Miller was demoted effective November 5, 1996, and filed a timely charge with the United States Equal Employment Opportunity Commission (EEOC) on or about April 27, 1997. She received a notification of right to sue from the EEOC shortly after its issuance on October 29, 1999. Miller timely filed her Complaint with the district court on January 24, 2000.

After completion of discovery, Firstar moved for summary judgment on July 2, 2001. One of the key issues raised by Miller in opposition to the bank's summary

judgment motion was the changing justifications offered by Firstar in support of its claim that Miller was not meeting the bank's expectations for the sale of banking products at her Carter Road branch. Those justifications continued to change even while the bank's summary judgment motion was pending in district court.

As discussed in more detail below, prior to a meeting with bank managers held on September 13, 1996, the performance goals that Miller had been given were quantitative goals on deposits, loans, etc. for the Carter Road branch – goals that she surpassed by margins of 14 to 19 percent. On September 13, 1996, Rodney and Sims informed Miller that, despite surpassing her goals by significant margins, her performance was nevertheless deficient because the level of sales and deposits at Carter Road (the smallest branch in the Western Kentucky Region) was below the average level of sales and deposits at other, larger, branches in the region. This was the stated reason for Miller's demotion offered by the banks's Regional President, Dean Rodney, in his affidavit and in Firstar's initial summary judgment memorandum.

With the filing of Firstar's reply memorandum in support of its motion for summary judgment, the bank's stated reasons for Miller's demotion changed. Firstar started arguing that Miller's performance was deficient, not because the level of activity at Carter Road fell below the regional average, but because the percentages by which Miller had exceeded her sales goals were less than the percentages by which some other branches had exceeded their goals. This new reason for Miller's demotion was also the reason cited in Firstar's brief to the circuit court.

On January 29, 2002, the district court granted Firstar's motion for summary judgment, purporting to apply the

burden- shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The district court found that Miller had not demonstrated that she was qualified for the Branch Manager position from which she was demoted, despite the fact that the bank continued to employ her in a relief manager position to fill in for other Branch Managers when they were absent. Because, in the district court's view, Miller had not demonstrated that she was qualified, it found that she had not established a prima facie case of discrimination sufficient to withstand Firstar's motion for summary judgment. [Pet. App. at 21a, 28a.]

Pursuant to Fed.R.Civ.P. 59(e), Miller filed a timely motion to alter, amend or vacate the judgment, in which she argued that the district court had applied an erroneous legal standard in its determination that she was not qualified for the Branch Manager position – an argument later upheld by the circuit court. Miller's Rule 59 motion was denied by the district court on June 6, 2002. [Pet. App. at 16a.]

In its opinion dated September 1, 2004, the United States Circuit Court of Appeals for the Sixth Circuit agreed with Miller that the district court had applied an erroneous legal standard in evaluating Miller's prima facie case. [Pet. App. at 10a-11a.] The circuit court found that, with application of the proper legal standard, Miller had in fact demonstrated that she was qualified for the Branch Manager position and had therefore established a prima facie case of race discrimination. Ultimately, however, the circuit court held that Miller had presented insufficient evidence that the bank's stated reasons for the demotion were pretextual to overcome the third prong of the *McDonnell Douglas* analysis. [Pet. App. at 11a-15a.] "[W]e find that she has failed to present evidence from which a reasonable jury could find that the justification offered by

Firstar for her demotion was pretext for discriminatory motives." [Pet. App. at 11a.]

In deciding that Miller had produced insufficient evidence of pretext to overcome summary judgment, the circuit court failed to even mention critical evidence of pretext contained in the record and misapplied this Court's decisions on the burden to be placed on Title VII plaintiffs in the third "pretext" stage of the *McDonnell Douglas* framework.

Miller filed a timely petition for rehearing with the circuit court, which was summarily denied on September 27, 2004. [Pet. App. at 1a.]

B. Evidence of Pretext.

Miller was demoted from her position as Branch Manager of Firstar's Carter Road branch in Owensboro, Kentucky, effective November 5, 1996. More than four years later, when Firstar's Regional President, Dean Rodney, gave his deposition, Miller was still the only African American who had ever been employed by Firstar, or any of its predecessor entities, as a Branch Manager in any of the bank's twelve Western Kentucky branches.

At the time she was demoted, Miller had worked for Firstar and its predecessors for more than fourteen years. She began her employment with Great Financial Bank (later merged with Cardinal Federal Savings and then Firstar Bank) in July 1982, when she was hired as a Teller Trainee at the Tamarack Road branch in Owensboro.[1] In 1987, she was

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[1] The events described herein occurred during the period 1994-1996, in the aftermath of Great Financial Bank's merger into

promoted to a Savings Counselor and, in 1989, to Head Teller. She always received positive performance evaluations and was particularly well-known for the high quality of her customer service.

In 1992, Bank Vice-President and Branch Operations Coordinator, Don Cassady, told Miller that she had been accepted for appointment as Branch Manager at the Tamarack Road branch, where she had worked for years. Miller was temporarily placed in charge of Tamarack Road, but, when it came time to appoint a permanent Manager, a white female was selected – Judy Thompson.

When Miller was passed over for the Tamarack Road position, despite Don Cassady's promise, she applied for the Branch Manager position at Towne Square Mall in Owensboro. Finally, in June 1993, Miller was offered the Branch Manager position at the bank's Carter Road branch in Owensboro.

Historically, Carter Road had been the bank's smallest free-standing branch in Owensboro – the only smaller branch being the in-store branch at the Owensboro Winn-Dixie grocery store. Carter Road was approximately one third the size of the Tamarack Road branch initially promised to Miller by Vice President Don Cassady, and approximately half the size of Towne Square Mall for which she later applied. Former District Manager Janice Patrick testified that the

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Cardinal Federal Savings. After Miller's demotion, but before her complaint was filed in district court, the bank merged once again, this time with Firstar Bank N.A., the named defendant/respondent in this action. Miller will refer to the respondent simply as "Firstar" or "the bank."

Carter Road branch had traditionally served a lower-income community than other Owensboro branches.

Patrick also testified that Miller did a good job as Branch Manager at Carter Road, despite the fact that the branch was understaffed and always busy. Patrick stated that Miller was very customer-oriented and that customers loved her. Patrick could not recall anyone saying anything negative about Miller. As Patrick testified, Miller faced a challenge at Carter Road, because it was very busy and needed additional staff.

The cramped space and short staffing at Carter Road became even more challenging for Miller when the bank began introducing its new emphasis on sales. Patrick testified that, when a Branch Manager has to deal with large numbers of customers on a regular basis, it is difficult to spend time on sales.

Lottie Miller became Branch Manager at Carter Road in June 1993. In 1994, new Bank President Jack Shipman began introducing what the bank has called a "new sales culture." As part of the new culture, Branch Managers were expected to be more aggressive in selling various Bank products to customers, including installment loans, credit insurance policies, and new depository accounts.

In the beginning, all of the Branch Managers, including Miller, had difficulty adapting to the new sales culture. The year 1995, in particular, was a difficult one for Miller and other managers. Throughout the year, Bank Regional President Dean Rodney and Sales Manager Mark Sims counseled Branch Managers, including Miller, about the need to increase sales.

However, Firstar's own documents demonstrate that, by 1996, Miller had made a successful transition to the demands of the new culture, and was in fact exceeding the goals established for the Carter Road branch.

As just one example, the retail deposit report for year-end 1996 shows the significant growth experienced by the Carter Road branch. Retail deposits at Carter Road increased by 20% ($2.7 million) in 1996, an accomplishment comparable to or better than the records of other branches. The bank's established goal for retail deposits at the Carter Road branch was $14,379,092. By year's end, Miller had exceeded that goal by more than 14%, achieving total retail deposits of $16,465,900. From 1994 to 1996, Carter Road's percentage of all Western Kentucky retail deposits increased by a factor of almost two thirds, from 2.72% in 1994 to 4.4% in 1996 – a record matched by only two other branches.

Bank records also show that Miller exceeded her 1996 goals for all categories of lending: equity loans, personal lines of credit ("PLC's"), and installment loans. For 1996, the Carter Road branch exceeded its established goals for equity loans and PLC's by more than 17%.

In all three categories of performance – retail deposits, equity loans and PLC's – the only significant shortfall came in the Fourth quarter of 1996. Miller was removed from her position as Branch Manager effective November 5, 1996. If she had been permitted to remain at Carter Road for the final two months of 1996, Miller's performance record indicates that the Carter Road branch would have performed even better.

Miller's 1996 performance in the area of Installment Loans was even more impressive. For 1996, the Carter Road

branch exceeded its goals for Installment Loans by more than 19%. Once again, the worst performance for the Carter Road branch occurred during the Fourth Quarter of 1996, when Miller's successor was at the helm for two of the three months.

As part of the new sales culture, the bank developed a number of statistical measures for evaluating sales efforts at the various branches. One of these new measures was the "cross sell ratio" – a statistic that measured the number of different products sold to a single customer. Another new measure was the "shop score." Anonymous callers would call into a branch (i.e. "shop" a branch) and give the branch a "shop score" depending on how knowledgeable branch employees were about different bank products.

Firstar's own records indicate that, by the end of 1995, Miller had made significant improvements in both the cross-sell ratios and the shop scores of the Carter Road branch. In a "Branch Visit" Memo dated February 27, 1996, Miller's Supervisor, Mark Sims, noted that Miller was doing a good job on her cross-sell ratios, much improved over much of the previous year, and was second in the region for the month of January 1996.

Seven months later, shortly before Miller was demoted, Dean Rodney (Regional President) and Mark Sims (Sales Manager) recorded in their notes of a September 13, 1996, meeting that they complimented Miller for her Shop Scores and the branch's cross-sell ratio.

By the end of 1995 and continuing throughout 1996, Firstar's records indicate that Miller had begun to excel in the "new sales culture" and was exceeding the bank's goals and expectations for the Carter Road branch in a wide range of

areas: retail deposits, equity loans, installment loans, personal lines of credit, cross-sell ratios and shop scores. However, she and other Branch Managers were still falling short in one other area – sale of "Great Financial Services" or "GFS" products. Annuities and other "non-traditional bank products" from Great Financial Services were among the products now being aggressively marketed by the bank. Every branch manager had an annual goal for "GFS Sales," "GFS Fee Income," and "GFS Sit Down Appointments." The Carter Road branch achieved 100% of its 1996 goal for "GFS Sit Down Appointments," but fell short on the two other GFS Goals, as did other branches. Miller's Carter Road branch and three other Owensboro branches had $0 in annuity sales and fell short of their goals in fee income. However, none of the branch managers from these other three branches were demoted for their performance.

Firstar has argued that Miller only surpassed her goals in "only a couple of areas." However, those "couple of areas" were actually six areas: (1) retail deposits, (2) equity loans and personal lines of credit , (3) installment loans, (4) cross-sell ratios, (5) shop scores, and (6) GFS Annuity "Sit-Down Appointments." The objective data about her performance for the year prior to her demotion are incontrovertible.

In its summary judgment decision, the district court rejected the objective evidence of Miller's superior performance and relied instead on Firstar's subjective and anecdotal evidence "that [Miller] continued to make ineffective sales calls in 1996" [Pet. App. at 22a] – a finding repeated by the circuit court. [Pet. App. at 5a.] But these findings are not supported by the record.

As correctly stated in both the district court and circuit court decisions, Miller admitted that she had trouble adjusting to the new sales-oriented environment, including making successful sales calls, during the first three quarters of 1995, but consistently contended that she had made the required adjustments by the end of 1995. Dean Rodney's own Affidavit states that Miller was last counseled on sales calls on October 3, 1995. At that time, Miller accepted a suggestion from Rodney that she go out on some sales calls with another manager (Pam Hughes) to learn her technique. The objective evidence on 1996 deposits and sales demonstrates that Miller had acquired the skills and experience necessary to excel in sales. There is no evidence in this record that her sales calls continued to be "ineffective" in 1996.

One critical fact not mentioned by the circuit court is that, throughout 1995 and 1996, Miller's Carter Road branch was plagued by staffing shortages. Miller made repeated requests for additional staffing to allow her to focus even more time and effort on her sales goals. But the staffing at Carter Road actually decreased in 1996 and was not increased until after Miller was removed as Branch Manager and replaced by a less experienced white employee – Chuck Young.

The staffing shortage at Carter Road and the increase in staffing provided by the bank to Miller's successor, are documented in Firstar's phone lists for the Western Kentucky Region:

Staffing at Carter Road Branch	
With Lottie Miller as Manager	**Employees (incl. Branch Manager)**
January 1995	3 Full-Time; 1 Part-Time
August 1995	3 Full-Time
January 1996	3 Full-Time, 1 Part-Time
June 1996	2 Full-Time, 2 Part-Time
With Chuck Young as Manager	**Employees (incl. Branch Manager)**
35435	4 Full-Time, 2 Part-Time
35661	5 Full-Time, 1 Part-Time
35827	6 Full-Time, 1 Part-Time

In 1996, Miller was shocked to learn from one of her customers that the bank intended to open a new and expanded Carter Road branch. No one in bank management had told Miller about any plans for a new and expanded branch and she asked Sales Manager Mark Sims about it. Sims denied any knowledge of plans for a new branch – but, on the very next day, plans for the new Carter Road branch were announced at a District-wide meeting of Bank employees. It was obvious to Miller's colleagues that she had not been told about the plans and the whole situation was extremely embarrassing for her.

On September 13, 1996, Regional Vice President Dean Rodney and Sales Manager Mark Sims finally met with Miller

to discuss the opening of the new Carter Road branch and the sales goals for the coming year. As discussed above, Miller was excelling in her performance and had significantly exceeded her 1996 goals for retail deposits, retail installment loans, personal lines of credit, and equity loans. Despite Miller's outstanding record, and despite the fact that the Carter Road branch had always been the smallest free-standing branch in Owensboro and served a low-income community, Rodney and Sims admonished Miller for banking activity that fell below the average for the other branches in the Western Kentucky Region. They told her the "below average numbers" could not continue once the new branch was opened, and that the production levels for 1997 would be significantly higher.[2]

Despite what Miller saw as the illogic and unfairness of comparing Carter Road's past level of activity with the regional average of other larger branches, she confidently accepted the challenge offered to her. Miller told Rodney and Sims that she understood that, with the new expanded branch, Carter Road would be expected to achieve results more on par with larger branches. If the chronic and long-standing staff shortage problems were finally addressed, Miller stated that she was confident that she could meet the new goals for 1997, just as she had done in 1996. Rodney and Sims closed the meeting by telling Miller that they would continue to monitor her performance.

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[2] Later, in the summary judgment reply memorandum that Firstar filed with the district court, Firstar stated that the real reason that Miller was demoted was not that sales at Carter Road were less than the regional average at other larger branches, but rather that the percentages by which Miller had exceeded her established goals for deposits and sales were less than the percentages by which some other branches had exceeded their goals.

Just two weeks later, on September 30, 1996, Dean Rodney and Mark Sims had another meeting with Lottie Miller, at which they informed her that she was being removed as Branch Manager for Carter Road and placed into the "Relief Manager Pool." Despite the fact that Miller had produced significant growth at the branch and exceeded her established goals in so many areas (retail deposits, loans, etc.), Rodney and Sims complained once again that the Carter Road branch fell below the average for the other branches in the Western Kentucky Region. Miller responded once again that, with a new Carter Road branch and sufficient staff, she would be able to achieve the new goals for 1997 – just as she had achieved her goals for 1996. Rodney and Sims told Miller that their decision was final and that, if she did not accept the Relief Manager position, they would have to get back to her about what the bank's position would be.

At the September 30 meeting, Miller asked Rodney and Sims whom they had chosen to replace her at Carter Road. They stated that "that has not been fully decided."

Believing that she would otherwise be fired, Miller accepted the Relief Manager position and was officially appointed to that position effective November 5, 1996.

The district court cited evidence of a "disorganized filing system" at the Carter Road branch in support of its ruling that Miller was not qualified to be Branch Manager. [Pet. App. at 22a.] The circuit court, likewise, stated that the filing system was "less than adequate." [Pet. App. at 6a.] But Firstar's allegation that the filing system at Miller's branch was "disorganized" stems from a single visit by Mark Sims made after he and Rodney had decided to replace her. It also occurred at a time when the branch was chronically understaffed and shortly after a bank robbery. But even given

these extraordinary circumstances, Miller has steadfastly denied that her branch was ever disorganized or poorly managed.

Miller's replacement was a white employee by the name of Chuck Young, who had two years experience in the banking industry. Young began working in his first banking position as a customer sales representative for Fifth/Third Bank in August 1994, after failing to complete a Masters program at the University of Louisville's School of Education.

An internal document prepared by Mark Sims indicates that Rodney was considering hiring Young to replace Miller as early as August 20, 1996 – three weeks before Sims and Rodney had their first meeting with Miller on September 13. On September 10, Rodney submitted a "personnel requisition" form for Chuck Young "to head up the new Carter Road office." On September 26, four days before the September 30 meeting with Miller, Chuck Young was offered the Branch Manager position. The salary offered to Young was $ 25,500 per year, $3,500 more than the $ 22,000 in annual salary paid to Miller.

Miller was given the position of Relief Manager in the bank's Relief Manager Pool effective November 5, 1996. Although Firstar chose to characterize Miller's change in position as a "lateral transfer," Miller recognized immediately that the decreased job responsibilities and status of the relief manager pool meant that she was receiving a demotion, and said so at the September 30, 1996, meeting with Rodney and Sims. When former District Manager Janice Patrick was asked at her deposition whether Miller's move from a Branch Manager position to the Relief Manager Pool was a demotion, she replied in the affirmative.

Although the bank maintained Miller's base salary at the same level after demoting her to the Relief Manager Pool, she was no longer eligible for many of the "incentive bonus awards" that full Branch Managers could receive. Relief Managers received bonus awards for products they sold (e.g, $1.00 for each interest checking account opened), but they were not eligible for the much larger awards that a Branch Manager received for meeting a particular branch's goals for loans and deposits.

Eventually, Miller became frustrated with the Relief Manager job because she was constantly required to "float" from branch to branch and never had any of her own customers. So that she could return to working at a single branch, Miller accepted a position as Assistant Branch Manager at Firstar's Towne Square Mall branch in Owensboro.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RECTIFY THE SIXTH CIRCUIT'S DEPARTURE FROM THIS COURT'S RULING IN *REEVES V. SANDERSON PLUMBING PRODUCTS* CONCERNING THE EVIDENTIARY BURDEN THAT A TITLE VII PLAINTIFF MUST MEET IN ORDER TO OVERCOME A DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PRESENT HER CASE TO A JURY

In upholding the district court's granting of summary judgment to Firstar, the circuit court held that Lottie Miller had established a prima facie case of race discrimination, but that she had failed to present sufficient evidence of pretext to present her case to a jury. Although the circuit court cited

this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the circuit court's discussion of the factual record demonstrates that, in fact it disregarded this Court's instructions in *Reeves*.

Justice O'Connor's unanimous opinion in *Reeves* resolved a conflict in the circuit courts regarding what evidence of pretext may be considered by the trier of fact in the third prong of the *McDonnell Douglas* analysis. In so doing, *Reeves* also established rules for when a trial court may grant judgment as a matter of law for the defendant, and when the court must permit the issues to be determined by a jury.

On the issue of when a Title VII case should be allowed to be presented to a jury, this Court stated that "a plaintiff's prima facie case, combined with sufficient evidence of pretext to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148.

Reeves reaffirmed that "the presumptions and burdens" in the first two stages of the *McDonnell Douglas* evidentiary framework "disappear" once the plaintiff has established her prima facie case and the defendant has proffered a legitimate non-discriminatory reason for its actions. *Reeves*, 530 U.S. at 142. However, this Court also held that "although the presumption of discrimination drops out of the picture once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom on the issue of whether the defendant's explanation is pretextual." *Reeves*, 530 U.S. at 143, *citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-256 (1981)

and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

Moreover, in *Reeves*, this Court stated that, while the factfinder's rejection of the employer's legitimate nondiscriminatory reason for its action does not *compel* judgment for the plaintiff, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 146-147. As noted in *St. Mary's Honor Center, supra,* "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." *Reeves*, 530 U.S. at 147, *quoting from St. Mary Honor Center*, 509 U.S. at 511 (emphasis added).

Finally, in *Reeves*, this Court issued a reminder that when a lower court considers a motion for judgment as a matter of law (whether under Rule 50 or Rule 56), "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." *Reeves*, 530 U.S. at 150-51, *quoting from Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151. The court must give credence to all evidence favoring the nonmovant – and must give credence to only that evidence from the moving party "that is uncontradicted or unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*, *quoting*

from 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, p. 300 (2d ed. 1995).

In this case, the circuit court violated each and every one of the precepts articulated in *Reeves*. The circuit court's treatment of the evidence in this case, and its conclusion that Miller failed to present sufficient evidence of pretext to overcome the bank's motion for summary judgment, are completely inconsistent with Justice O'Connor's unanimous opinion in *Reeves*.

On the issue of whether the bank had nondiscriminatory grounds for demoting Miller, the circuit court minimized the significance of the overwhelming objective evidence from Firstar's own records that Miller not only met, but far exceeded, the quantitative goals set for her by bank management. Instead, the circuit court focused on the subjective judgments recorded by Sales Manager Mark Sims in bank memos. Firstar did not submit an affidavit from Sims or otherwise offer his sworn testimony. Nevertheless, the circuit court credited Sims unsworn statements over Miller's sworn deposition testimony that, on the single branch visit made by Sims after the decision to replace Miller had already been made, Sims found "that the staff did not adequately understand their responsibilities, that the filing system was less than adequate, and that too many responsibilities were being assigned to the head teller." [Pet. App. at 6a.] All of these allegations were disputed by Miller in both her deposition testimony and her affidavit.[3]

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[3] Even the district court declined to rely on Sims' unsworn allegations that miller delegated too much responsibility to her head teller and that her staff lacked a clear understanding of their duties – allegations that were based on a single branch visit made after the decision to replace Miller had already been made. [Pet.

The circuit court also accepted without question bank management's subjective assessment that, at the time of her demotion, Miller "was still not placing sales calls properly." [Pet. App. at 5a] Once again, the objective evidence on 1996 sales indicates otherwise. Moreover, Miller denied under oath that she was still having trouble with sales after she was counseled about it in October 1995 and went out on some sales calls with another manager (Pam Hughes) to learn her technique.

The circuit court distorted the record when it stated that "Miller was unable to complete any sales calls individually as branch manager." [Pet. App. at 5a.] In fact, Miller's 1996 mid-year performance evaluation stated that she "[is] now making sales calls more frequently." [R.31, Exhibit B to Rodney Affidavit (1996 Performance Evaluation), pg. 1.]

The circuit court also stated that Miller was unable to complete any sales individually as branch manager. [Pet. App. At 5a.] The evidence of record indicates otherwise. The only category in which Miller made no sales was Great Financial Services ("GFS") annuity products – a category in which three other branch managers also made no sales. The fact that none of these other branch managers (all white) were demoted is, in fact, evidence supporting Miller's claim of pretext – evidence ignored by the circuit court.

One of the circuit court's most glaring errors was its refusal to acknowledge the record of mendacity on the part of Firstar and its managers. Prior to the September 13, 1996,

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App. At 28a.] Ironically, one of the comments in Miller's November 1995 performance review was that she needed to delegate more duties to her staff.

meeting with Rodney and Sims, the performance goals that Miller had been given were quantitative goals on deposits, loans, etc. for the Carter Road branch – goals that she surpassed by margins of 14 to 19 percent. On September 13, 1996, Rodney and Sims informed Miller that, despite surpassing her goals, her performance was nevertheless deficient because the level of sales and deposits at Carter Road (the smallest branch in the Western Kentucky Region) was below the average level of sales and deposits at other, larger, branches in the region. Indeed, this was the stated reason for Miller's demotion offered by Dean Rodney in his affidavit and in Firstar's initial summary judgment memorandum.

But, beginning with its summary judgment reply memorandum, Firstar started arguing that Miller's performance was deficient, not because the level of activity at Carter Road fell below the regional average, but because the percentages by which Miler had exceeded her goals were less than the percentages by which some other branches had exceeded their goals. That is the argument that the Firstar made to the circuit court.

Yet, in its decision of September 1, 2004, the circuit court ignored these changing rationales for Miller's removal, stating simply that "these numerous justifications can all be reduced to the assertion that, based on poor performance, Miller was not fit to manager the Carter Road branch . . ." [Pet. App. at 11a.] The circuit court refused to acknowledge the substantive changes in Firstar's stated reasons for Miller's demotion and

failed to view the bank's changing position as evidence of both mendacity and pretext.[4]

The circuit court also failed to give any evidentiary weight to the outright lies and misrepresentations made to Miller by Rodney and Sims. The two managers lied to Miller on September 13, 1996, when they told her they were continuing to evaluate the situation and monitor her performance. Yet, three days before the September 13 meeting, Rodney had already submitted a personnel requisition form requesting that Chuck Young be made Branch Manager at Carter Road. When Rodney and Sims told Miller on September 30 that no final decision had been made on her replacement, they once again were not telling the truth. Young had already been offered the position as Carter Road Manager on September 26, at a salary that was $3,500 greater than Miller's.

The circuit court, in understated fashion, acknowledged that the bank "was less than forthright with Miller about her status as branch manager" and that management "took steps to replace Miller while at the same time representing to her that she could retain her position . . ." [Pet. App. at 14a]

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[4] The circuit court ignored established Sixth Circuit precedent in this regard. "An employer's changing rationale for making an adverse employment decision can be evidence of pretext." *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1167 (6th Cir. 1996) *am. on other grounds*, 97 F.3d 833 (6th Cir. 1997). "Shifting justifications over time calls the credibility of those justifications into question." *Cicero v. Borg-Warner Automotive*, 280 F.3d 579, 592 (6th Cir. 2002); *see also Fox v. Certainteed Corp.*, 198 F.3d 245 (6th Cir. 1999) (explaining that evidence tending to demonstrate the inconsistency of the employer's explanations for the plaintiff's discharge may raise an inference of pretext).

Yet, the circuit court chose to dismiss this additional evidence of mendacity, stating that "these actions do not tend to show that Miller's demotion was more likely motivated by discriminatory animus than by Firstar's proffered justification." [*Id.*] The circuit court thus trivialized the lies told to Miller by bank managers Dean Rodney and Mark Sims.

The circuit court made no mention of the limited qualifications possessed by Chuck Young – the white male selected as Miller's replacement at the Carter Road branch. Young had only two years experience in banking (as compared to Miller's more than fourteen years) and no educational background even remotely related to business, economics or finance. But when the circuit court ignored the qualifications possessed by Chuck Young and the pay he received, it also ignored the reasonable inferences favorable to Miller that could have been drawn from the bank's decision to replace Miller with a person of Young's extraordinarily limited experience.

Finally, the circuit court made no mention whatsoever of short staffing at Miller's branch – the fact that, during much of 1996, Miller's Carter Road branch was understaffed, that beginning in June 1996 there was no Head Teller at Carter Road, and that Miller's requests for more staff went ignored until after she was replaced as branch manager. When Chuck Young was put in the manager position in November 1996, Rodney and Sims immediately increased the staff at Carter Road from three full time employees (two full time + two part-time) to five full-time employees (four full-time + two part-time) – an increase of two thirds. The efforts by bank management to undermine Miller's performance by denying her the staff she needed, including a Head Teller, while making sure that Young had adequate staffing, is additional

and compelling evidence that the bank's stated reasons for Miller's removal (poor performance) were pretextual.

Miller respectfully contends that, under the guidance given by this Court in *Reeves*, her objective record of achievement at the Carter Road branch, the shifting rationales for her demotion, the bank's repeated refusal to provide needed staff to her branch until immediately after she was replaced, the striking lack of experience of her white replacement, and the evidence of mendacity on the part of bank management, taken as a whole, constitute sufficient evidence of pretext for a reasonable jury properly to infer that the real reason for Miller's demotion was not her job performance. Miller respectfully submits that, on this evidentiary record, a reasonable jury could properly infer that the bank was willing to accept an African-American Branch Manager at Carter Road, when it was the smallest branch in the region serving a low-income population, but that the bank could not accept a African-American Branch Manager at a brand new expanded Carter Road branch.

It may turn out that the jury does not make the inferences urged by Miller in this case. The jury may choose instead to give credence to the subjective judgments recorded by Mark Sims, *ex post facto*, on his one branch visit (assuming Firstar even produces Sims to testify). But, under *Reeves*, once the plaintiff's evidence of pretext passes a threshold, the inferences to be made from the evidence, the weight to be given to the evidence, and the relative credence to be given to the different witnesses, are all questions for a jury, not the district court.

CONCLUSION

It is not difficult to imagine why this Honorable Court would choose to deny a writ of certiorari here. This case involves a single Title VII plaintiff in which the lower courts' decisions were based upon fact-intensive judgments about the evidentiary record. However, the greatest hurdle faced by any Title VII plaintiff is the defendant's motion for summary judgment. Indeed, the district court's weighing of the evidence at the summary judgment stage is the most critically important event in a Title VII case. In *Reeves*, this Court set out standards for when a district court may substitute its own judgment for that of a jury's, and when a district court must permit a jury to decide a case based on the evidence presented by the parties. When the circuit court in this case discarded the guidance set forth in *Reeves* and dismissed Lottie Miller's claims despite the strong evidence of pretext she presented, it undermined the purpose and the promise of Title VII. The circuit court's opinion warrants review by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-5857

[Filed September 27, 2004]

Lottie J. Miller, Plaintiff - Appellant	)
v.	)
Firstar Bank N.A. Defendant-Appellee	)

ORDER

BEFORE: BATCHELDER, GIBBONS, and COOK, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

Entered By Order of the Court

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-5857

[Filed September 1, 2004]

LOTTIE J. MILLER, Plaintiff-Appellant,	)
v.	)
FIRSTAR BANK N.A., Defendant-Appellee.	)

Before: BATCHELDER, GIBBONS, and COOK, Circuit Judges.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff-appellant Lottie J. Miller is an employee of defendant-appellee Firstar Bank N.A. ("Firstar"). Miller began working for a predecessor of Firstar, Great Financial Bank ("Great Financial"), in 1982.[1] In 1993, Miller – an African-American

[1] In January 1998, Star Bank, N.A., acquired Great Financial. Star Bank merged with Firstar later that year.

female – became manager of Great Financial's Carter Road branch. She continued in that position until 1996, when Great Financial demoted her to relief manager and replaced her with a white male. After receiving a right to sue letter from the Equal Employment Opportunity Commission ("EEOC"), Miller filed suit against Firstar alleging that its predecessor, Great Financial, discriminated against her on account of her race and sex in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") by demoting her in 1996. The district court granted summary judgment to Firstar, which Miller appeals. For the following reasons, we affirm the judgment of the district court.

I.

Miller began working for Great Financial as a teller trainee in July 1982 at its Tamarack Road branch in Owensboro, Kentucky. Over the years, Miller was promoted to various positions, including teller, savings counselor, and head teller. After many years of service to Great Financial and after a brief stint as temporary manager of the Tamarack Road branch in early 1993, Miller became manager of the Carter Road branch in Owensboro on June 1, 1993.

In 1993, Great Financial charged its branch employees principally with responding to customer requests rather than with actively marketing bank services to customers. Branch managers were responsible only for the day-to-day operations of their respective branches. Great Financial adopted a new approach in 1994, when it decided that all bank employees would actively market the bank's various products and services as part of their job responsibilities. Each employee was now expected to meet personal sales goals, and each branch was expected to meet newly established performance goals. Expectations of branch managers specifically increased.

In addition to their traditional managerial responsibilities, branch managers were now expected to meet personal sales goals, which included making a set number of "sales calls" to local businesses each month to market bank services and aggressively selling various of the bank's products, including installment loans, credit insurance policies, and deposit accounts.

Although Miller performed adequately as branch manager prior to 1994, she admittedly experienced problems adjusting to this new "sales culture." Her performance in 1995 was particularly poor. In fact, under her management the Carter Road branch was last in the state in cross-selling in August of 1995.[2] She was not making her sales calls properly. Her 1995 performance evaluation stated: "[Miller] has been successful in the past where knowledge of products, policies and procedures were primary to a manager's job. With the new team, sales-culture-concept implemented this year, she has been slow to start." The evaluation also conveyed that, "when the sales culture was implemented in the [Carter Road] branch, the staff responded with improved numbers; however, overall, the goals and objectives have not been met, in part, due to the slow nature of accepting the sales environment and lack of an ongoing plan to increase revenue at the branch." Dean Rodney, then Executive Vice President of Great Financial and responsible for the company's western region in Kentucky (of which the Carter Road branch was a part), addressed his concerns about the Carter Road branch with Miller and suggested that she meet with more successful

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[2] Cross-selling was a measurement used by the bank to gauge each branch's sales performance. It measured the average number of products a branch sold per customer.

managers to learn about effective sales strategies. Rodney also warned Miller that she would be replaced if she could not improve the branch's performance.

Miller succeeded in improving the performance of the Carter Road branch in several areas in early 1996. The branch was generally meeting its loan and deposit goals, and bank management complemented Miller on the branch's cross-sell ratios. Yet, Miller herself was still experiencing difficulty adjusting to certain aspects of Great Financial's new sales culture. Specifically, Miller was unable to complete any sales individually as branch manager, and she was still not placing sales calls properly. Also, check deposits made at the branch occasionally arrived late at Great Financial's processing center.

On September 13, 1996, Rodney and Great Financial's Sales Manager Mark Sims met with Miller to discuss the performance of the Carter Road branch. They informed her that the branch was performing below the branch average for the western region in several areas, and they notified her that these below average numbers could not continue. They also informed Miller that the Carter Road branch was going to be expanded and relocated to a new building. Rodney and Sims told Miller that, on account of this expansion, they were raising the goals for the Carter Road branch immediately and that they would be raised again in 1997. Miller was informed that her performance would be monitored on a weekly basis to determine whether she was capable of meeting these new and future expectations. These representations were made to Miller even though Rodney had already submitted a requisition on September 10, 1996, to hire Charles Young, a white male, as manager of the expanded Carter Road branch.

Sims monitored the branch over the next two weeks. He determined that the staff did not adequately understand their responsibilities, that the filing system was less than adequate, and that too many responsibilities were being assigned to the head teller. Sims attributed these deficiencies to failures by Miller.

On September 30, 1996, Rodney and Sims met again with Miller and informed her that she was being demoted-from her position as manager of the Carter Road branch to relief manager. Relief managers filled in as managers at different branches on an as-needed basis. Miller accepted the demotion[3] and was replaced as manager of the Carter Road branch by Young.[4] Miller filed a charge with both the Kentucky Commission on Human Rights and the EEOC on April 27, 1997, alleging that Great Financial discriminated against her on account of her sex and race when it demoted her to relief manager. The EEOC issued Miller a right to sue letter on October 29, 1999.

On January 24, 2000, Miller filed suit in the United States District Court for the Western District of Kentucky against Firstar and Firstar Corporation, its parent company, as successors to Great Financial. Miller alleged that, in demoting

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[3] Some disagreement exists as to when the demotion became effective. Firstar contends it became effective October 1, 1996. Miller avers that the demotion became effective November 5, 1996. For summary judgment purposes, we construe the evidence in favor of Miller and assume that her demotion became effective November 5.

[4] Miller was eventually appointed an assistant manager at the bank's Towne Square Mall branch in Owensboro, the position she now holds.

her from Carter Road branch manager to relief manager in 1996, defendants discriminated against her on account of her race and gender in violation of Title VII, 42 U.S.C. § 2000e-2(a).[5] On July 2, 2001, defendants filed a motion for summary judgment on Miller's claims.

The district court granted defendants' motion on January 29, 2002. The court found that Miller had no claim against Firstar Corporation because it had never been her employer. Accordingly, the court dismissed all of Miller's claims as against Firstar Corporation. With respect to Firstar Bank, the court found that Miller failed to present any direct evidence of discrimination and that she failed to present a case of discrimination with indirect evidence because she had not met the prima facie requirement of showing that she was qualified for the position from which she was demoted.

On February 8, 2002, Miller filed a motion with the district court pursuant to Fed R.Civ.P. 59(e) requesting that

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[5] Miller also presented a claim relating to her removal as temporary manager of the Tamarack Road branch. When Great Financial selected a permanent manager for that branch in 1993, it selected a white female instead of retaining Miller, which Miller claimed constituted racial discrimination. The district court denied the claim on the ground that Miller did not challenge the employment action in a timely charge with the EEOC pursuant to 42 U.S.C. § 2000e-5(e)(1) and on the ground that Miller could not show that the employment action was part of a continuing violation with the 1996 demotion, which was challenged in a timely charge. While Miller contested the district court's finding that the 1993 employment action was not part of a continuing violation in her brief on appeal, she conceded at oral argument that she could not prevail on this issue. Therefore, her 1993 claim is time barred, and we need not address the merits of the claim in this opinion.

it alter or amend its judgment. The district court denied this motion on June 6, 2002. Miller then filed a timely notice of appeal on July 1, 2002, contesting the district court's grant of summary judgment to Firstar Bank but not its grant of summary judgment to Firstar Corporation.

II.

We review a district court's grant of summary judgment *de novo*. *Abbott v. Crown Motor Co.*, 348 F.3d 537, 539 (6th Cir. 2003). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When evaluating a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 613 (6th Cir. 2003). Ultimately, the court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

To bring a Title VII claim on the basis of indirect evidence[6], a plaintiff must first establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green, 411* U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). In order to establish a prima facie case, "a plaintiff must show that (1)

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[6] Miller does not challenge the district court's finding that she did not present any direct evidence of discrimination.

she is a member of a protected group, (2) she was subject to an adverse employment decision, (3) she was qualified for [her] position, and (4) she was replaced by a person outside of the protected class." *Carter v. Univ. of Toledo*, 349 F.3d 269, 273 (6th Cir. 2003). Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to produce a legitimate, non-discriminatory justification for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802. If the defendant meets this burden of production, the plaintiff then bears the burden of demonstrating that the asserted justification is mere pretext for discriminatory motives. *Carter*, 349 F.3d at 273.

A. Prima Facie Case

The district court found that Miller did not establish a prima facie case of discrimination because she did not provide evidence showing that she was qualified for her position. Specifically, the court determined that Miller failed to produce evidence sufficient to demonstrate that she was meeting Great Financial's legitimate expectations in 1996 as branch manager. On appeal, Miller asserts that the court improperly considered evidence submitted by Firstar in making this determination and that she produced evidence sufficient to prove she was qualified for the position from which she was demoted.

A plaintiff can show she was qualified for her position by demonstrating that she was meeting her employer's expectations at the time of the challenged adverse employment action. *See Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 548-49 (6th Cir. 1991). At the summary judgment stage, the question is only whether a reasonable jury could find, *on the basis of the evidence provided by the plaintiff*, that she was qualified for her position. *Cicero v. Borg-Warner Auto., Inc.*,

280 F.3d 579, 585, 587-88 (6th Cir. 2002); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 661 (6th Cir. 2000). A court may not consider a defendant's justification for an adverse employment action when evaluating the plaintiff's evidence:

> It is . . . inappropriate for the district court in the pre-trial stage to rely on the nondiscriminatory reason for [an adverse employment action] to find plaintiff's prima facie case inadequate. This is true even if that "production" evidence happens to show that, in the employer's view, the plaintiff was not meeting its legitimate expectations for the position at issue.

Cline, 206 F.3d at 661. Instead of considering a defendant's proffered justification and accompanying evidence when determining whether a plaintiff has presented sufficient evidence to prove that she was qualified, courts should consider such evidence at the pretext stage of the *McDonnell Douglas* inquiry. *Cicero*, 280 F.3d at 587-88.

In determining that Miller was not meeting Great Financial's legitimate expectations, the district court impermissibly considered the justification offered by Firstar for Miller's demotion. Firstar's justification for Miller's demotion is essentially that, based on Miller's past performance, Great Financial did not believe that Miller was suited to manage the Carter Road branch as its operations expanded. Firstar offers various evidence in support of this justification, including evidence that Miller's branch was not organized and that she was not properly making sales calls. The court explicitly considered this evidence in finding that Miller could not show she was qualified to be branch manager. For instance, the court noted: "Plaintiff does not dispute that her sales calls were ineffective or that her branch

was disorganized and performed at a below average level." Such justification evidence is precisely the type of evidence that may not be considered at the prima facie stage of the *McDonnell Douglas* inquiry. *See Cicero*, 280 F.3d at 587-88 (finding as error a district court's consideration of defendant's justification evidence at the prima facie stage when the issue was whether plaintiff was qualified). The district court therefore erred by considering this evidence in the process of finding that Miller could not show she was qualified for her position.

Nevertheless, we need not resolve whether Miller can otherwise demonstrate mat she was qualified for her position because we find that she has failed to present evidence from which a reasonable jury could find that the justification offered by Firstar for her demotion is pretext for discriminatory motives.

B. Pretext

Although Firstar presents several justifications for its demotion of Miller in 1996, these numerous justifications can all be reduced to the assertion that, based on past poor performance, Miller was not fit to manage the Carter Road branch as its operations expanded. To demonstrate that this justification is pretext, Miller must show by a preponderance of the evidence that it (1) has no basis in fact, (2) did not actually motivate her demotion, or (3) was insufficient to warrant the demotion. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Even if Miller can show in one of these three ways that Firstar's justification is not to be believed, however, a factfinder is not required to conclude that discriminatory motives animated the decision to demote her. Indeed, while "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity

of the employer's explanation," this inference is not mandatory. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). As the Supreme Court has made clear, "the ultimate question is whether the employer intentionally discriminated, and proof that the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct.'" *Id.* at 146-47 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). In other words, rather than merely "*disbelieve* the employer[,] the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Hicks*, 509 U.S. at 519. Consequently, in certain circumstances, "although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory" and, therefore, summary judgment for the defendant will be appropriate. *Reeves*, 530 U.S. at 148.

Miller does not attempt to show that Firstar's justification was insufficient to motivate her demotion. And she cannot, though she attempts to, demonstrate that the justification has no basis in fact. Indeed, several undisputed facts support the proposition that Miller was not performing adequately so as to continue as manager of the Carter Road branch. First, Miller did not complete any personal branch manager sales during 1996, much less meet her personal branch manager sales goals that year. Second, Miller's sales calls continued to be ineffective, as evidenced by an exchange between Miller and Sims in February of 1996 during which Miller informed Sims that she had not opened any accounts as a result of her sales calls and that she was sometimes speaking only to receptionists or secretaries, which was not the proper way to

make sales calls.[7] Third, at least until August of 1996, the Carter Road branch was not consistently dropping off deposited checks at Great Financial's processing center each day in a timely manner as it was required to do, a failure admitted by Miller that resulted in lost revenue for both her branch and the bank.[8] These facts amply support Firstar's proffered justification.

Nor does Miller provide evidence sufficient to show that the justification did not actually motivate her demotion. Miller claims the decision to demote her was actually motivated by the desire to free a branch manager position for a new hire. As evidence of this motivation, Miller notes that a document dated August 20, 1996, signed by Rodney, discusses demoting Miller and replacing her with Young. Then, on September 10, 1996, Rodney approved a personnel requisition for Young. The requisition stated that Young was to be hired as "Branch Mgr. to head up the new Carter Rd. office." Rodney testified that such requisitions were filed when a district president

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[7] Miller claims in her brief on appeal that her sales calls were effective. However, she points to no record evidence that supports this assertion. Such conclusory assertions are not sufficient to demonstrate a genuine issue of material fact necessitating trial. *See Moore v. Philip Morris Cos.*, 8 F.3d 335, 343 (6th Cir. 1993). Moreover, the fact that she opened no new accounts as a result of her calls directly refutes her assertion that these calls were effective.

[8] Miller asserts in her reply brief that the branch missed a drop off on only one occasion, citing Rodney's deposition testimony. However, this testimony makes clear that the branch "missed its daily drop on several occasions." Additionally, Miller testified that she recalled "*deadlines* being missed," rather than one isolated incident.

"wanted approval from senior management to bring additional staff on board." Rodney also attested that this personnel requisition represented his "intention as a district president . . . to consider [Young] as a branch manager's position [sic] at the Carter Road office." Despite the fact that Rodney was already taking steps to hire Young as branch manager of Carter Road, he and Sims represented to Miller on September 13, 1996, that she could retain her position if she improved the branch's performance. Miller was not informed that she was being demoted until September 30, 1996. She contends that all this evidence supports a finding that Firstar wanted to hire Young, a white male, as a branch manager and then, to make room for him, demoted her. In other words, Miller argues that her demotion was not motivated by Firstar's belief that she was not fit to manage the Carter Road branch as it expanded but was actually motivated by a desire to make room for someone else – Young.

While this evidence suggests Great Financial was less than forthright with Miller about her status as branch manager and that the company took steps to replace Miller while at the same time representing to her that she could retain her position if she improved her performance, these actions do not tend to show that Miller's demotion was more likely motivated by discriminatory animus than by Firstar's proffered justification. Nor do they support an inference that Firstar's sole motivation in demoting her was to create a position for a new hire. In fact, the August 20 document actually supports Firstar's justification. The document states at the outset: "With location change at Carter Road, what is strongest staff to maximize success? To what position should we move Lottie Miller? Should we make an offer to Chuck Young? Or move Scott McFarland to Carter Road?" These comments indicate that Great Financial decided to remove Miller from manager of the Carter Road branch because it did

not believe that she could "maximize success" as the branch expanded, which is consistent with Firstar's justification. Furthermore, the document suggests that the decision to remove Miller was made prior to any decision regarding who should fill her position. Far from proving that it was more likely than not that Miller was targeted on account of her race or sex to make room for Young, the document indicates that Great Financial decided to demote Miller based on her poor performance and only then considered who would replace her, a deduction bolstered by the fact that Young's requisition was not submitted until September 10. In conclusion, we find that Miller has failed to produce evidence that permits a finding that the decision to demote her was more likely animated by impermissible motives than by Firstar's proffered justification.

III.

For the foregoing reasons, we affirm the district court's grant of summary judgment to Firstar.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION NO. 4:00CV-14-S

[Filed January 29, 2002]

LOTTIE J. MILLER,
PLAINTIFF

v.

FIRSTAR BANK, N.A.
and FIRSTAR CORPORATION,
DEFENDANTS

Before: CHARLES R. SIMPSON III, JUDGE, UNITED STATES DISTRICT COURT.

MEMORANDUM, OPINION, AND ORDER

Charles R. Simpson III, Judge. This matter is before the court on plaintiff's Motion to Alter or Amend Judgment. For the reasons stated below, plaintiff's motion will be **DENIED.**

BACKGROUND

The facts relevant to this motion are set out in our earlier opinion, dated January 29, 2002.

DISCUSSION

Plaintiff moves under FED.R.CIV.P. 59(e) for this court to alter or amend its January 29, 2002 grant of summary judgment to defendant Firstar Bank, N.A. ("Firstar"). A motion to alter or amend a judgment "is granted only in limited circumstances, and . . .is within the informed discretion of the district court." *Shivers v. Grubbs*, 747 F. Supp. 434, 436 (S.D. Ohio 1990)(citing *United States Labor Party v. Oremus*, 619 F.2d 683, 692 (7th Cir. 1980)). "Motions made under [Rule 59(e)] are not intended to be utilized to relitigate old matters nor to allow a party to present his case under a new theory; these motions are designed to correct manifest errors of fact or law or as vehicles to present newly discovered evidence." *Milwee v. Peachtree Cypress Investment Co.*, 510 F. Supp. 284, 289-90 (E.D. Tenn. 1978); *see also Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998).

Plaintiff first contends we erred in finding she was unqualified for her position and thus failed to establish a *prima facie* case under Title VII. As most of plaintiff's argument is merely an attempt to relitigate her response to Firstar's summary judgment motion, we will only address plaintiff's perceived error of law.

Citing *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660-66 (6th Cir. 2000), plaintiff argues we misapplied the

McDonnell Douglas test[9] because we considered Firstar's non-discriminatory reason for terminating her in concluding she was unqualified for her position. We disagree. In *Cline* a teacher was terminated after her employer, a Catholic school, discovered she was pregnant. She alleged the termination constituted illegal sex and pregnancy discrimination. Her employer claimed she was terminated because her pregnancy evidenced she engaged in premarital sex, which was against the Catholic church's values. The district court granted the employer summary judgment. The court found the teacher had not established a *prima facie* case because her engaging in premarital sex rendered her unqualified for her position. The Sixth Circuit reversed, holding the district court's analysis "improperly imported the later stages of the *McDonnell Douglas* inquiry into the initial *prima facie* stage." *Id.* at 660. The court stated:

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[9] The *McDonnell Douglas* test for determining Title VII violations holds that plaintiff must first establish a *prima facie* case by showing 1) she is a member of a protected class; 2) she was qualified for her position; 3) she suffered an adverse employment action; and 4) she was replaced by a person outside the class or a comparable, non-protected person received better treatment. *See Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir. 1992)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 , 36 L. Ed. 2d 668 (1972); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). If a *prima facie* case is established, a presumption of discrimination arises and the defendant must "articulate some legitimate, nondiscriminatory reason for [the adverse employment action]." *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S. Ct. at 1824. The burden then shifts again to the plaintiff to prove by a preponderance of the evidence that the nondiscriminatory reason offered is merely a pretext for discrimination. *See Burdine*, 450 U.S. at 253, 101 S. Ct.

> [Defendant] alleges it did not renew [plaintiff's] contract because she violated its premarital sex policy, which constituted part of the broader ministerial requirements of being a [Catholic school] teacher; conversely, [plaintiff] argues that this rebuttal is a pretext for discrimination. Rather than resolve this debate at the prima facie stage, *McDonnell Douglas* requires that the district court consider this dispute at the inquiry's third stage, when its role is to decide the "ultimate question" of discrimination.

Id. Thus, a court may not use the alleged basis for discrimination, e.g., the teacher's pregnancy in *Cline*, as grounds for determining a plaintiff is unqualified for her position.

Here, in contrast, we did not determine the alleged basis for discrimination, plaintiff's race and gender, rendered her unqualified for her position. Rather, we based our decision on Firstar's evidence that she was not meeting its legitimate expectations.

Next, plaintiff argues we erred in concluding her 1993 branch assignment did not constitute a continuing violation for purposes of assessing the timeliness of her related Equal Employment Opportunity Commission charge. Plaintiff, however, fails to establish any factual or legal error and her motion will therefore be denied regarding this issue.

CONCLUSION

For the reasons stated above, plaintiff's Motion to Alter or Amend Judgment will be **DENIED**.

This 29 day of January, 2002.

/s/ CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

ORDER

For the reasons set forth in the memorandum opinion entered this date and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that plaintiff's Motion to Alter or Amend Judgment is **DENIED**.

IT IS SO ORDERED this 29 day of January, 2002.

/s/ CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION NO. 4:00CV-14-S

[Filed January 29, 2002]

LOTTIE J. MILLER,
PLAINTIFF

v.

FIRSTAR BANK, N.A. and
FIRSTAR CORPORATION,
DEFENDANTS

Before: CHARLES R. SIMPSON III, JUDGE, UNITED STATES DISTRICT COURT.

MEMORANDUM, OPINION, AND ORDER

This matter is before the court on motion of the defendants for summary judgment. For the reasons set forth below, defendants' motion will be **GRANTED**.

BACKGROUND

Plaintiff, an African-American female, is employed by defendant Firstar Bank, N.A.("Firstar"). In 1993, while employed by Firstar's predecessor, Great Financial Bank, Plaintiff was told by the bank's Vice President and Branch Operation Coordinator that she would be promoted to Manager of the bank's Tamarack Road branch in Owensboro, Kentucky. She was, however, passed over for the promotion in favor of a Caucasian female. She subsequently applied for a branch Manager position at the bank's Towne Square Mall branch in Owensboro but did not receive that position either. Plaintiff was eventually promoted to Manager of the bank's smallest Owensboro branch, Carter Road.

In 1994, the bank changed its business strategy and began to focus on sales. Each branch was given sales goals and employees were expected to promote the bank's products. Branch managers were made responsible for new customer development and their branch's overall sales performance. Plaintiff reported to both a sales manager, Mark Sims, and the bank's Executive Vice President, Dean Rodney.

Both parties acknowledge that plaintiff had initial problems adjusting to the bank's new sales culture. (Rodney Aff. ¶ 10; Pltf. Decl. ¶ 9). In 1995, she was counseled by Rodney and Sims on several occasions about her poor sales performance. (Rodney Aff. ¶¶ 11-13; Pltf. Decl. ¶ 9). However, the parties differ in their characterizations of plaintiff's overall job performance. Defendants have presented evidence that plaintiff continued to make ineffective sales calls in 1996. They also show that her branch failed to make required daily check drops, maintained a disorganized filing system, and continued to demonstrate below average

performance in comparison to other branches. (Rodney Aff. ¶¶ 18-20, Exh. B).

Plaintiff, on the other hand, presents evidence that her branch exceeded its sales goals in the areas of retail deposits and lending. (Rodney Dep. Exh. 2). She also shows that she was praised for her ability to sell numerous products to one customer and for her performance on anonymous spot checks of her branch employees' product knowledge. (Rodney Dep. Exhs. 14, 17).

On September 13, 1996 Rodney and Sims again met with plaintiff regarding her performance. They told her that her performance on sales goals was below average for her region and that her goals would be raised for the remainder of the year and again in 1997 because a larger branch building was being built. They also told her she would be monitored on a weekly basis. Over the next two weeks it was determined that plaintiff's branch was poorly managed. (Rodney Aff. ¶ 22). Consequently, plaintiff was transferred to a relief manager pool on October 1, 1996 and was replaced by a Caucasian male.

Plaintiff claims "her assignment as Manager to a lower-volume location in 1993 and her demotion in 1996 were because of her race and gender." (Pltf. Compl. ¶ 11). Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") on April 25, 1997 and subsequently received a right to sue letter. She therefore brought this suit against defendants alleging unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (Pltf. Compl. ¶ 14).

DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c); *see, Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

However, the moving party's burden may be discharged by demonstrating that there is an absence of evidence to support an essential element of the nonmoving party's case for which he has the burden of proof. *Id.* at 323, 106 S. Ct. at 2552. Once the moving party demonstrates this lack of evidence, the burden passes to the nonmoving party to establish, after an adequate opportunity for discovery, the existence of a disputed factual element essential to his case with respect to which he bears the burden of proof. *Id.* If the record taken as a whole could not lead the trier of fact to find for the nonmoving party, the motion for summary judgment should be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

A. Claims Against Firstar Corporation

Plaintiff concedes she has no viable employment discrimination claim against defendant Firstar Corporation as this defendant is not and has never been her employer. (Pltf.

Response Mem. Summ. J. at 1). Her claims against Firstar Corporation will accordingly be dismissed.

B. Claims Arising From 1993 Branch Assignment

Firstar first argues that plaintiff has not exhausted her administrative remedies regarding her claims arising from the 1993 branch assignment because her EEOC charge only cites her 1996 transfer to the relief manager pool. We disagree. Plaintiff's EEOC charge specifically alleges a continuing action. (Pltf. Dep. Exh. 4). A "continuing action" is "an ongoing, continuous series of discriminatory acts." *Haithcock v. Frank*, 958 F.2d 671, 677 (6th Cir. 1992)(citations omitted). As "the administrative complaint should be liberally construed to encompass all charges 'reasonably expected to grow out of the charge of discrimination,'" we find that the 1993 branch assignment is encompassed by plaintiff's allegation of a continuing action. *Id.* at 675 (6th Cir. 1992)(quoting *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977)).

Next, Firstar argues that plaintiff's EEOC charge regarding the 1993 assignment was untimely. We agree. In order to maintain an action under Title VII, plaintiff was required to file an EEOC charge within three hundred days of the 1993 branch assignment. 42 U.S.C. § 2000e-5(e)(1). She did not do so until April 27, 1997, more than three years later. (Pltf. Dep. Exh. 4). Plaintiff argues the charge was timely as a continuing violation. The continuing violation theory holds that "where there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety as long as one of those discriminatory acts falls within the limitations period." 958 F.2d at 677 (citations omitted). We find the continuing violation theory does not apply here.

Continuing violations fall into two categories. "The first category of continuing violations arise [sic] 'where there is some evidence of *present* discriminatory activity giving rise to a claim of a continuing violation; that is, where an employer continues presently to impose disparate work assignments or pay rates between similarly situated groups.'" *Id.* at 678 (quoting *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991)(emphasis in original). "This category requires a 'current' as well as 'continuing' violation: at least one of the forbidden discriminatory acts must have occurred within the relevant limitations period." *Dixon*, 928 F.2d at 216 (citing *Bazemore v. Friday*, 478 U.S. 385, 394-5, 106 S. Ct. 3000, 3005-06, 92 L. Ed. 2d 315 (1986)). Plaintiff argues that her current demoted status as a relief manager is a continuation of the alleged discriminatory 1993 branch assignment. This argument is attenuated. There is no evidence "the alleged discriminatory practices were sufficiently interconnected to satisfy the definition of continuing violation as required by this circuit." *Haithcock*, 958 F.2d at 678. They are best characterized as isolated incidents rather than a progression of discriminatory events.

"The second category of 'continuing violation' arises where there has occurred 'a longstanding and demonstrable policy of discrimination.' Unrelated incidents of discrimination will not suffice to invoke this exception; rather, there must be a continuing 'over-arching policy of discrimination.'" *Dixon*, 928 F.2d at 217 (quoting *E.E.O.C. v. Penton Industrial Pub. Co., Inc.*, 851 F.2d 835, 838 (6th Cir. 1988), *Janikowski v. Bendix Corp.*, 823 F.2d 945, 948 (6th Cir. 1987)). There is no evidence that Firstar had a longstanding policy of discriminating against employees based on their race or gender. Plaintiff cites two, unrelated allegedly discriminatory incidents, both of which are exclusive to her. Such evidence does not suffice to demonstrate the second

category of continuous violations. *See Haithcock*, 958 F.2d at 679 (finding plaintiff "must demonstrate something more than the existence of discriminatory treatment in his case" in order to invoke the second category of continuing violations.).

C. Claims Arising From 1996 Transfer to Relief Manager Pool

In order to show Firstar violated Title VII, plaintiff must first establish a *prima facie* case by showing that 1) she is a member of a protected class; 2) she was qualified for her position; 3) she suffered an adverse employment action; and 4) she was replaced by a person outside the class or a comparable, non-protected person received better treatment.[10] *See Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir. 1992)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1972); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). If a prima facie case is established, a presumption of discrimination arises and the defendant must "articulate some legitimate, nondiscriminatory reason for [the adverse employment action]." *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S. Ct. at 1824. The burden then shifts again to the plaintiff to prove by a preponderance of the evidence that the nondiscriminatory reason offered is merely a pretext for discrimination. *See Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093.

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[10] Alternatively, plaintiff may establish a *prima facie* case by showing discriminatory intent. However, as plaintiff has produced no direct evidence of this, we will proceed under *McDonnell Douglas*. *See Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 n.4 (6th Cir. 1991).

Firstar argues that plaintiff has not established a *prima facie* case because she cannot show she was qualified for her position. We agree. "In order to be 'qualified' for her position, [plaintiff] must demonstrate that she was meeting her employer's legitimate expectations and was performing to her employer's satisfaction." *Warfield v. Lebanon Correctional Inst.*, 181 F.3d 723, 729 (6th Cir. 1999)(citations omitted). Further, "if [plaintiff] was not doing what [her] employer wanted her to do, [she] was not doing [her] job. . . ." *Kephart v. Institute of Gas Tech.*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied* 450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed. 2d 383 (1981)(quoted in *McDonald v. Union Camp. Comp.*, 898 F.2d 1155, 1160 (6th Cir. 1990)). Plaintiff does not dispute that her sales calls were ineffective or that her branch was disorganized and performed at a below average level. Instead she argues that the bank's criteria were unfair. (Pltf. Resp. Mem. Summ. J. at 21, 23). "However, the aim is not to review bad business decisions, or question the soundness of an employer's judgment. [Miller] was simply not performing to [the bank's] satisfaction. Since [Miller] concedes this point, there remains no genuine issue of material fact as to whether [she] was qualified." *McDonald*, 898 F.2d at 1160 (citations omitted).

CONCLUSION

For the reasons set forth above, the court will grant the defendants' motion for summary judgment. A separate opinion will be entered herein this date in accordance with this opinion.

This 29th day of January, 2002.

/s/ CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

ORDER

Motion having been made by the defendants for summary judgment, and for the reasons set forth in the memorandum opinion entered herein this date, and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the defendants' motion is **GRANTED** and the plaintiff's claims will be **DISMISSED**. The court having dismissed all claims in this case, this is a final and appealable order.

This 29th day of January, 2002.

/s/ CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
JAN 28 2005
OFFICE OF THE CLERK

No. 04-884

In The
Supreme Court of the United States

LOTTIE MILLER,

Petitioner,

v.

FIRSTAR BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Should this Court deny certiorari when there is no conflict between the circuits that would warrant review, the petition raises no important federal question and the petition would require this court to make a fact-specific determination regarding the sufficiency of the evidence?

PARTIES TO THE PROCEEDING/CORPORATE DISCLOSURE STATEMENT

Respondent Firstar Bank, N.A. is now U.S. Bank National Association, whose stock is owned by U.S. Bancorp.

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RULES

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STATEMENT OF THE CASE

Petitioner Lottie Miller filed this lawsuit on January 24, 2000 against Firstar Corporation, n/k/a U.S. Bancorp and Respondent Firstar Bank, N.A., n/k/a U.S. Bank National Association ("Firstar" or the "Bank"). Petitioner alleged that one of Respondent's predecessors, Great Financial Bank, discriminated against her because of her race and gender in violation of Title VII of the Civil Rights Act of 1964 when it transferred her from branch manager to relief branch manager in 1996.

The District Court granted summary judgment in favor of both Firstar and Firstar Corporation on Petitioner's claims, concluding that Petitioner had not established a prima facie case because she had not established that she was qualified for the position. *Miller v. Firstar Bank, N.A.*, Case No. 4:00CV-14-5 (W.D. Ky. Jan. 29, 2002) (Petition p. 21a). Petitioner filed a Notice of Appeal with respect to the claims against Firstar arguing that under recent Sixth Circuit law, an employer's legitimate reason should not be considered at the prima facie stage to determine if an employee was qualified. The United States Court of Appeals for the Sixth Circuit, in a 3-0 opinion, affirmed the District Court's Order in this case on September 1, 2004, determining that regardless of whether Petitioner could establish a prima facie stage, there was insufficient evidence of pretext and no reasonable jury could conclude that Petitioner's race or sex played a role in the Bank's decision to move her to a different position. *Miller v. Firstar Bank, N.A.*, 111 Fed. Appx. 796, 2004 U.S. App. LEXIS 18967 (6th Cir. 2004) (Petition p. 2a). Petitioner filed a petition for rehearing, which the Court of Appeals denied on September 27, 2004.

Petitioner then filed this petition for certiorari asking this Court to review whether she had produced sufficient evidence of pretext, contrary to the Sixth Circuit's determination. The Sixth Circuit's fact specific determination that Petitioner's "evidence" was insufficient does not present any issues warranting the Court's review.

STATEMENT OF THE FACTS

Respondent Firstar Bank, N.A. was a national bank, headquartered in Milwaukee, Wisconsin, with full-service branches in Ohio, Wisconsin, Missouri, Kansas, Kentucky, Indiana, Illinois, Iowa, Minnesota, Tennessee, Arkansas, and Arizona. It was the product of a 1998 merger between Star Bank, N.A. and Firstar Bank, N.A. and a 1999 merger with Mercantile Bank, N.A. of St. Louis, Missouri. Firstar Bank, N.A. is now known as U.S. Bank National Association. In January, 1998, before the Star Bank/ Firstar Bank merger, Star Bank acquired Great Financial Bank, a savings bank headquartered in Louisville, Kentucky. Petitioner's allegations relate to events that allegedly occurred when she was employed by Great Financial Bank.

Lincoln Federal Savings and Loan Association, a predecessor to Great Financial Bank, hired Petitioner for the position of Teller in July, 1982. Over the years Petitioner held various positions with Great Financial Bank, including teller, savings counselor, and head teller. In May, 1993, Great Financial merged with Cardinal Federal and Dean Rodney, a Cardinal Federal Vice President, became Executive Vice President, responsible for retail branches in the Owensboro, Kentucky area. Around this time,

Petitioner was offered and accepted the position of branch manager at Great Financial Bank's Carter Road Branch. Petitioner assumed this position, in which she reported to Rodney, on June 1, 1993.

When Petitioner first became a branch manager, Bank employees had traditional banking duties, often acting as "order takers," and functioning based upon customer-driven requests for services – accepting deposits and opening accounts at the customer's request. At that time, the Bank was not making a serious, focused effort to target customer needs and actively sell the Bank's services. Branch managers were generally responsible for the daily operation of the branch.

This changed when Jack Shipman became President of Great Financial Bank in 1994. Shipman introduced a new sales culture that required all Bank employees to actively market the Bank's products. All branch employees – from tellers to branch managers – were now expected to target customer needs and promote products in which the customer might be interested. All employees had personal sales goals they were expected to meet, and the branches had goals (based upon past performance) that each branch was expected to meet.

Branch managers had new responsibilities for developing new customers and expanding the branch's customer base. In addition to the branch manager's traditional responsibility for branch operations and management of employees, branch managers were now also responsible for personal goals, such as making a set number of external sales calls to local businesses each month, and for the branch's overall performance, including, but not limited to, equity and installment loans generated, checking accounts

opened, credit insurance policies sold, and branch cross sell ratios (the average number of products sold to each customer). To generate new business, branch managers were expected to be active in the business community through active participation in civic and social activities, in addition to their responsibilities at the branch.

To facilitate the implementation of the new sales culture, Shipman created a new position, known as sales manager, to oversee sales development in the branches. As the sales culture became increasingly important, this position became more and more important, and branch managers ultimately reported directly to the sales manager with regard to sales issues. Mark Sims filled this position in the Owensboro region where Miller's branch was located.

Initially, some employees resisted the change from a traditional banking role to the new sales culture. Petitioner, in particular, had problems with the new culture and was slow to adjust and hesitant to make sales calls. The Bank made efforts to assist Petitioner in adjusting to the new sales culture. The Bank provided her, and other employees, with professional sales training, which Petitioner attended and found to be a good program. Dean Rodney, Petitioner's manager, also suggested Petitioner go out on sales calls with another employee so that Petitioner could watch someone else and become more comfortable with the process. Petitioner subsequently went out on calls with Pam Hughes, a financial service representative, and found the experience to be helpful.

However, by June, 1995, despite the Bank's assistance, Petitioner still was not adapting fully to the new sales culture, and she was not making the required number of

sales calls. On June 16, 1995, Rodney and Mark Sims counseled Petitioner on her failure to make sales calls. Rodney emphasized to Petitioner that sales calls were a requirement for branch managers and that she must maintain the required number of calls, or changes would have to be made to her position with the Bank. Petitioner indicated she understood.

In August 1995 Petitioner's branch performed last in the state in cross-selling. Rodney addressed his concerns about the branch's performance with Petitioner and Lisa Hartz, the head teller at Carter Road, in a telephone call on August 22, 1995. During this call, Petitioner admitted her lack of success in sales, stating that she was unable even to give away free products, such as debit cards. To help the situation and improve the branch's performance, Rodney suggested that Petitioner and Hartz meet with more successful managers to get ideas for improving their cross-selling numbers. Rodney also warned Petitioner and Hartz that if they did not improve, personnel changes would have to be made at the Carter Road branch.

Petitioner continued to have difficulty with sales calls, despite Rodney's efforts to assist her. For example, Petitioner's reports showed calls that did not meet the Bank's standards for acceptable calls. Specifically, Petitioner was calling on receptionists and non-decision-makers, instead of managers and others authorized to give the Bank business. She also was making all of her monthly calls in one or two days at the end of the month, instead of spreading the calls throughout the month, which would have given her more time to spend on each call. Petitioner acknowledged that this was not the proper way to make sales calls, and that it was possible for her to spread her

calls out over the month. On October 3, 1995, Mark Sims counseled Petitioner on this issue.

Petitioner was hesitant to adapt to other new innovations as well. In November, 1995, she was hesitant to obtain training on the new computer program for processing loans. When she finally had the training she did not use the program.

In November, 1995, Rodney and Sims evaluated Petitioner and noted that Petitioner was "slow to adapt to sales culture," "seems very uncomfortable with sales," "needs a more pro-active approach with her staff to receive better results on goals," and was "still very uncomfortable with sales." With regard to her overall management skills, Rodney and Sims noted:

> When the new sales culture was implemented in the branch, the staff responded with improved numbers; however, overall, the goals and objectives have not been met, in part, due to the slow nature of accepting the sales environment and lack of an ongoing plan to increase revenue at the branch.
>
> The creativity innovation process has not been developed, since the focus has been on carrying out the basic requirements of the day to day activity of the branch.
>
> . . .
>
> The team concept for high performance is not fully implemented at Carter Road. There is a perceived need to foster a better effort and team work. With the high expectations set for this office compared to 95 results, there is a need to receive more from the staff. . . . Lottie['s] "style"

> with sales gives the impression of being uncomfortable.

Petitioner admitted that many of these comments were justified.

For 1996, the Western Kentucky Region, the region overseen by Rodney, was given an aggressive business plan. There was greater pressure on all employees – from Rodney down to bank tellers – to market products and meet sales performance expectations. Rodney felt particular pressure from upper management, including Shipman, to improve the Carter Road Branch's performance.

However, despite Rodney's and Sims's efforts to improve Petitioner's performance, Petitioner continued to struggle to keep up with both her sales and managerial responsibilities. Petitioner continued to make eight to nine sales calls in one day instead of spreading them throughout the month, despite being warned that Rodney and Sims did not believe that she could make so many quality sales calls in one day.[1]

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[1] As the Sixth Circuit correctly noted, Petitioner's unsupported assertions that she was making effective sales calls are not only not supported by the record, but are directly contradicted. As the Sixth Circuit noted, Petitioner's own belief that she was effective is not probative in light of the fact that she had zero sales. (Petition, p. 13a, fn. 7) In addition, Petitioner's Petition claims that Dean Rodney stated in his affidavit that Petitioner "was last counseled on sales calls on October 3, 1995." (Petition, p. 12) The affidavit does not characterize this counseling as the *last* time she was counseled on sales calls. In fact, Mark Sims counseled her on sales calls in February, 1996 and Petitioner's 1996 evaluation noted she "has made sales calls this yr. – however, appears to be a need for more quality in the calls in order to make sales," and "needs to be more assertive in managing."

In August, 1996, Rodney counseled Petitioner concerning the failure of her branch to drop off checks at the processing center, as each branch was required to do daily. The Carter Road Branch missed its daily drop on several occasions, resulting in lost income to the branch and the Bank. In one instance, $250,000 in checks was left in the branch over the weekend. Rodney warned Petitioner that this was unacceptable, and that it was Petitioner's responsibility to make sure the drops were completed daily.

By August, 1996, Petitioner was still behind other branch managers in acclimating to the new sales environment, and she had demonstrated she was unable to handle the dual responsibilities of sales and branch management. Rodney and Sims were receiving pressure from upper management, including Jack Shipman to make the branch perform at a higher level, and Rodney and Sims were particularly concerned because the Bank was building a new expensive Carter Road Branch down the street. With a new, costly building, the branch would have even greater performance expectations. Rodney and Sims believed that Petitioner would not be able to meet those expectations since she was struggling with the expectations of a smaller branch.

On September 13, 1996, Rodney and Sims met with Petitioner concerning the branch's performance. They noted that the Carter Road Branch was below the average for the region in terms of lending, credit protection, checking totals, and Great Financial Services.[2] Petitioner had

[2] Petitioner attempted to argue to the Sixth Circuit that the Bank changed its reasons for transferring her when it said her branch was below average in sales and then said her branch was below average in achievement of sales goals. The Court of Appeals correctly noted that

(Continued on following page)

not met some goals at all. For example, Petitioner's branch had a total of Ø Great Financial Services Manager Sales, where there was a minimum goal of $50,888.00 and attained only 66.4% of its goal for Great Financial Services Fee Income. In addition, although Petitioner was meeting and/or exceeding some goals, she was doing so to a much lesser extent than those met and exceeded by other branch managers who had higher goals. Of the eleven branches in the Western Kentucky Region, all but three branches substantially increased their retail deposits in 1996 because the Bank changed the way it calculated deposits, adding IRA deposits (previously excluded) to the total. Several branches increased their deposits by 30-40% compared to the Carter Road Branch which only increased its deposits by 19.5%. Similarly, although Petitioner was meeting her total goal for equity loans (which included personal lines of credit) and installment loans for the first three quarters, she was one of the lowest achievers in terms of goal percentage achieved in the entire Western Kentucky Region for that period of time and Petitioner failed to meet her monthly goals in both equity loans and installment loans for five of the nine months she was branch manager in 1996. Most other branches in the Western Kentucky Region met and exceeded their goals for equity loans and installment loans to a much greater extent than did Petitioner.

Rodney and Sims advised Petitioner that the below average numbers could not continue, and that the branch's

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these statements are not contradictory (in fact, Petitioner does not dispute that both statements are true) and amount to the same thing, Petitioner was not fit to manage the Carter Road Branch as its operations expanded based on past poor performance. (Petition p. 11a)

goals were being raised for the remainder of the year and would go up again in 1997 because of the new branch building and higher expectations of the branch's sales capabilities. Instead of accepting the additional responsibility, Petitioner told Rodney and Sims that ***if*** she had more staff, she could meet the goals.[3] Rodney and Sims told Petitioner they would be monitoring her performance weekly to determine whether she could meet these new expectations.

Sims further reviewed the branch over the next two weeks and determined, in his opinion, that the staff did not have a clear definition of duties, the filing system was in disarray, work areas were unorganized, and too many responsibilities were being delegated to the Head Teller. He attributed this to Petitioner's poor management style. Petitioner now falsely claims that she has denied all of these allegations; in fact, she admitted in her deposition that the branch was behind in filing.

On September 27, 1996, Rodney and Sims transferred Petitioner to the position of relief manager effective October 1, 1996. Rodney and Sims made this decision because, after giving Petitioner ample opportunity (more than one and one-half years) her overall performance and

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[3] Petitioner attempts to claim that her alleged staffing issues somehow established that her transfer was motivated by her race. The evidence established that all branches were short-staffed. Petitioner testified in her deposition that she was short-handed in the summer of 1996 because her branch suddenly lost one employee to death and another employee quit. Obviously, the Bank did not create Petitioner's staffing problem, and the fact that staffing increased after this unexpected decrease (and after the branch was moved to a larger location) is neither surprising nor "evidence" that her race played a role in her transfer.

that of the Carter Road Branch was not meeting the Bank's expectations. Rodney and Sims were convinced that with the added pressure and increased goals for the expanding branch, they could no longer wait for Petitioner to improve her performance as a branch manager. The goals for the Carter Road Branch had been lower than most other branches but Petitioner still failed to attain and/or exceed the goals to the same extent as the other branches attained and exceeded their higher goals. They were concerned that Petitioner would not be able to meet the greater expectations of the new branch. In response, Petitioner accused Rodney and Sims of trying to "get rid of all of the Great Financial people and promote the Cardinal employees." Petitioner admitted she believed this to be true because she believed employees who had come from Cardinal received preferential treatment.

Petitioner was not the only branch manager who was transferred to a different position. Two (2) white branch managers (Judy Thompson and Karen Easton) who reported to Dean Rodney were also transferred to different positions in 1995 and 1996 because of their failure to adjust to the new sales culture. Judy Thompson had difficulty adjusting to the new sales culture, particularly to making sales calls. As a result, she was transferred to the position of assistant manager at a reduction in pay. Karen Easton also had difficulty adjusting to the new sales culture, and was transferred to the position of teller, also with a reduction in salary. Petitioner actually received more favorable treatment than these white employees because she was given a lateral transfer to the position of relief manager, which enabled her to fill in as manager at branches throughout the Owensboro area without a reduction in pay. She remained eligible for an incentive

package, kept her status as a manager, retained the same salary, and still reported to Rodney; whereas, the white employees received a reduction in pay and transferred to the position of assistant manager or to the position of teller.

Despite the fact that no one at the Bank had ever said anything negative about Petitioner's sex or her race, that the decisionmakers in this case, Dean Rodney and Mark Sims had a history of placing women in the position of branch manager, and that at least fifty percent (50%) of the branch managers in the Owensboro market were female, Petitioner filed this action alleging race and sex discrimination.[4] Petitioner's only "evidence," and only reason to believe, that her race or sex was a factor in her transfer was that a white male subsequently took over the position of branch manager at Carter Road. Chuck Young, had an established background in banking and sales with a competitor – Fifth Third Bank. At the time, Fifth Third had a more established sales culture and Young had excelled in that environment with $1 million in installment lending during the first three quarters of 1996. Also, unlike Petitioner, Young had a bachelors degree from Centre College and had completed coursework toward a masters degree from the University of Louisville. He was highly qualified for the position and with his track record and past performance, Rodney and Sims believed he could succeed at the new Carter Road Branch.

[4] Petitioner has since abandoned her sex discrimination claim.

REASONS FOR DENYING THE WRIT

As Petitioner herself acknowledges: "This case involves a single Title VII Plaintiff in which the lower courts' decisions were based upon fact-intensive judgments about the evidentiary record." (Petition, p. 26) The Sixth Circuit's decision affirming summary judgment for Respondent because Petitioner's "evidence" was insufficient to establish race discrimination does not present an important question warranting this Court's review. The district court judge and the three judges for the United States Court of Appeals for the Sixth Circuit are all in agreement that summary judgment is appropriate. Petitioner cites no compelling reason for this Court to grant her writ. The Sixth Circuit's decision does not conflict with the decision of another court of appeals on an important matter and does not decide an important federal question. Petitioner does not establish that a review of the Sixth Circuit's decision would have any application outside of this individual case.

The Sixth Circuit's decision rests on the principles enunciated in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-49 (2000). Its fact-based determination that Petitioner has not presented sufficient evidence of discrimination under *Reeves* does not present an important issue for this Court's review. The Sixth Circuit's analysis of Petitioner's "evidence" is as follows:

> . . . [S]everal undisputed facts support the proposition that Miller was not performing adequately so as to continue as manager of the Carter Road branch. First, Miller did not complete any personal branch manager sales during 1996, much less meet her personal branch manager sales goals that year. Second, Miller's sales calls continued to

> be ineffective, as evidenced by an exchange between Miller and Sims in February of 1996 during which Miller informed Sims that she had not opened any accounts as a result of her sales calls and that she was sometimes speaking only to receptionists or secretaries, which was not the proper way to make sales calls. Third, at least until August of 1996, the Carter Road branch was not consistently dropping off deposited checks at Great Financial's processing center each day in a timely manner as it was required to do, a failure admitted by Miller that resulted in lost revenue for both her branch and the bank. These facts amply support Firstar's proffered justification.
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> . . . Miller argues that her demotion was not motivated by Firstar's belief that she was not fit to manage the Carter Road branch as it expanded but was actually motivated by a desire to make room for someone else – Young.
>
> While this evidence suggests Great Financial was less than forthright with Miller about her status as branch manager and that the company took steps to replace Miller while at the same time representing to her that she could retain her position if she improved her performance, these actions do not tend to show that Miller's demotion was more likely motivated by discriminatory animus than by Firstar's proffered justification.

Miller v. Firstar Bank, N.A., 111 Fed. Appx. 796, 2004 U.S. App. LEXIS 18967 (6th Cir. 2004) (Petition, pp. 12a-14a).

Petitioner's petition makes clear that it seeks to have this Court review the Sixth Circuit's evaluation of sufficiency

of the evidence rather than any general legal principle. The review should be denied. The Sixth Circuit properly stated the law under *Reeves*. Petitioner claims that the Circuit Court violated the precepts in *Reeves*, but does not explain what precepts were allegedly violated.[5] That Petitioner disagrees with the decision of the Circuit Court and believes it misapplied the law does not warrant review by this Court. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10.

Furthermore, the Sixth Circuit's ruling is plainly correct. Petitioner's undisputed failings in various areas of her position, regardless of whether she was successful in other areas, supports her transfer to a different position where she could be more successful. Even if the Bank concealed its plans for the branch from Petitioner until it was ready to make the change, the critical issue is whether the reason behind the plans was discriminatory because of race. There is no evidence to support such a finding. All of the judges who have reviewed this case have determined that Petitioner did not present sufficient

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[5] Petitioner only partially cites the decision of this Court in *Reeves*. Although Petitioner correctly notes that this Court stated in *Reeves* that a plaintiff's prima facie case combined with sufficient evidence to find that an employer's asserted justification is false *may* permit the trier of fact to conclude that the employer unlawfully discriminated, this Court went on to state that such a showing by the plaintiff will not always be adequate. "Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148.

evidence to support her claims. The petition should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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